No. 02-94

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IN THE

Supreme Court of the United States

WILLIAM OVERTON, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

MICHELLE BAZZETTA, et al,

Respondents.

On Writ of Certiorari To the United States Court of Appeals For The Sixth Circuit

BRIEF OF THE PETITIONERS

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43 pp

QUESTIONS PRESENTED

Whether prisoners have a right to non-contact prison visitation protected by the First and Fourteenth Amendments.

Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections are reasonably related to legitimate penological interests.

Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment.

PARTIES TO THE PROCEEDING

This case involves an eight-year-old controversy between incarcerated felons, their visitors and the Michigan Department of Corrections. Petitioners are the Michigan Department of Corrections and the Director of the Michigan Department of Corrections (MDOC).

Respondents include eleven class representatives, on behalf of themselves and all others similarly situated, including all inmates incarcerated by MDOC and non-incarcerated potential visitors of MDOC inmates. The eleven representative plaintiffs are Michelle Bazzetta, Stacey Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Branaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton, and Arturo Bunton, through his next friend, Valerie Bunton.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

1. 1995 Revised Visitation Policy 4
2. Visitation at MDOC Facilities 5
3. The Proceedings Below 6
4. The Current Appeal 7

TRIAL TESTIMONY CONCERNING MDOC'S PENOLOGICAL INTEREST 10

SUMMARY OF THE ARGUMENT 18

ARGUMENT 20

I. Prisoners Have No Right to Non-Contact Visitation Protected By the First and Fourteenth Amendments 20

II. MDOC's Non-Contact Prison Visitation Restrictions are Reasonably Related to the Legitimate Penological

Interests of Institutional Security, Safety, and Elimination of Substance Abuse 26

III. MDOC's Restrictions on Non-Contact Prison Visitation Do Not Constitute Cruel and Unusual Punishment in Violation of the Eighth Amendment 32

CONCLUSION 38

TABLE OF AUTHORITIES

Page

Cases

Bazzetta v. McGinnis,
124 F.3d 774 (6th Cir. 1997) ..... passim
Bazzetta v. McGinnis,
133 F.3d 382 (6th Cir. 1998) 1, 7
Bazzetta v. McGinnis,
148 F. Supp. 2d 813 (E.D. Mich. 2001) 1, 9
Bazzetta v. McGinnis,
286 F.3d 311 (6th Cir. 2002) 1, 5, 9
Bazzetta v. McGinnis,
902 F. Supp. 765 (E.D. Mich. 1995) 1, 6
Bell v. Wolfish,
441 U.S. 520 (1979) 24, 35
Block v. Rutherford,
468 U.S. 576 (1984) 23
City of Dallas v. Stanglin,
490 U.S. 19 (1989) 20
Estelle v. Gamble,
429 U.S. 97 (1976) 19, 32, 33, 37
Gerber v. Hickman,
291 F.3d 617 (9th Cir. 2002),
cert. den. 123 S. Ct. 558; 154 L. Ed. 2d 462 (2002) 25
Jones v. North Carolina Prisoners' Union,
433 U.S. 119 (1977) 20, 34
Ky. Dept. of Corrections v. Thompson,
490 U.S. 454 (1989) 24
McKune v. Lile,
536 U.S. 24 (2002) 36
Olim v. Wakinekona,
461 U.S. 238 (1983) 18, 24
O'Lone v. Estate of Shabazz,
482 U.S. 342 (1987) 21

Pell v. Procunier,
417 U.S. 817 (1974) 18, 20, 26, 29
Rhodes v. Chapman,
452 U.S. 337 (1981) 33, 35
Roberts v. United States Jaycees,
468 U.S. 609 (1984) 20
Sandin v. Conner,
515 U.S. 472 (1995) 35
Shaw v. Murphy,
532 U.S. 223 (2001) 21, 32
Thornburgh v. Abbott,
490 U.S. 401 (1989) 21
Whitley v. Albers,
475 U.S. 312 (1986) 34, 36
Wilson v. Seiter,
501 U.S. 294 (1991) 34

Statutes

28 U.S.C. § 1254(1) 2
42 U.S.C. § 1983 ..... 3, 6
MCL 791.268a 9

Rules

Mich. Admin. Code R. 791.6609 4

Constitutional Provisions

U.S. Const. amend. I 2
U.S. Const. amend. VIII 2
U.S. Const. amend. XIV 2

OPINIONS BELOW

On August 31, 1995, Respondents filed a complaint challenging Petitioner's prison visitation regulations. On October 6, 1995 the United States District Court Eastern District of Michigan entered an opinion and order denying Respondents' motion for preliminary injunction, which is reported at *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1995). (Pet. App. pp. 160a-173a.) The April 9, 1996 opinion and order of the district court granting Petitioners' motion for summary judgment is not reported, but is reprinted in the Appendix to the Petition for Writ of Certiorari. (Pet. App. pp. 143a-159a.)

The Court of Appeals' September 4, 1997 opinion affirming the district court's grant of summary judgment is reported at *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997). (Pet. App. pp. 127a-142a.) On January 5, 1998, the Court of Appeals issued a supplementary opinion, which is reported at *Bazzetta v. McGinnis*, 133 F.3d 382 (6th Cir. 1998). (Pet. App. pp. 121a-126a.)

On July 2, 1998, the district court permitted the Respondents to reinstate their claim that the visitation regulations violated their constitutional rights. Following a bench trial, the court ruled in Respondents' favor on April 19, 2001. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001). (Pet. App. pp. 24a-120a.)

Petitioners appealed and on April 10, 2002, the Court of Appeals affirmed the district court. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002). (Pet. App. pp. 5a-23a.)

The petition for certiorari was docketed on July 18, 2002, and was granted on December 2, 2002. Petitioners respectfully request this Court to reverse the judgment of the United States

Court of Appeals for the Sixth Circuit, entered on April 10, 2002.

JURISDICTION

Petitioners seek review of an opinion of the United States Court of Appeals for the Sixth Circuit, which was entered on April 10, 2002. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002). This Court has jurisdiction to review the April 10, 2002 opinion of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. VIII provides that:

> Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV provides that:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. 1995 Revised Visitation Policy

In 1995, as a result of numerous visitation problems at MDOC facilities, including the molestation of a child during prison visitation, MDOC reviewed its existing visitation policy and implemented changes.[1] The revised visitation policy adopted by MDOC limited the total number of visitors who were eligible to visit each prisoner, regulated the times and dates of visits at MDOC facilities, and required that a visitor be on an approved visitor list prior to participating in visitation. *Bazzetta v. McGinnis*, 124 F.3d 774, 776 (6th Cir. 1997). In an attempt to limit the large number of children entering MDOC facilities for prison visitation, the revised visitation policy limited the number of minor children who could visit prisoners by requiring that these children be the child, stepchild or grandchild of the prisoner and requiring that all minor children be accompanied by an adult immediate family member or legal guardian. The 1995 visitation policy also denied visitation between a minor child and a prisoner when the parental rights of the prisoner had been terminated. In addition, the 1995 visitation policy limited prison visitation between current and former inmates to only those former inmates who were immediate family members of the prisoners they wished to visit. *Id.* at 776.

During the 1995 review of MDOC's visitation policy, MDOC also attempted to adopt a new form of discipline in order to combat inmate substance abuse, which had become an enormous security problem for prison administrators. *Bazzetta*

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[1] The specific rule at issue in this case is Mich. Admin. Code R. 791.6609 and the corresponding provisions of the Director's Office Memorandum 1995-58, which have been reprinted in the Appendix to the Petition for Writ of Certiorari. (Pet. App. pp. 174a-188a.)

v. McGinnis, 286 F.3d 311, 321 (6th Cir. 2002). The 1995 visitation policy was amended to provide that any inmates found guilty of two or more substance abuse major misconducts would lose all visitation privileges for a minimum of two years, upon approval by the Director. *Id.* at 321. Pursuant to MDOC policy, the two-year visitation restriction could not be imposed until after the inmate at issue had an opportunity to participate in an MDOC disciplinary hearing with regard to the underlying major misconduct tickets. As set forth in the Director's Office Memorandum 1995-58 (Pet. App. pp. 178a-188a), after the expiration of two years, the inmate could request reinstatement of visitation privileges; however, the request had to be approved by the Director. 286 F.3d at 321.

2. Visitation at MDOC Facilities

There are two types of visitation permitted at MDOC facilities, contact and non-contact. Contact visits take place in a large visitation room with numerous prisoners and visitors in attendance, and physical contact is permitted between the inmate and the visitor, whereas non-contact visits take place in small booths or cubicles at the edge of the visitation room and physical contact is prohibited. *Bazzetta v. McGinnis,* 124 F.3d 774, 775 (6th Cir. 1997). Prisoners incarcerated at MDOC facilities are classified from security level I through security level VI, and the most dangerous inmates are those classified at security levels V and VI. With regard to security level V and VI inmates, all visitation is non-contact, and it takes place in separate booths. However, inmates classified at security levels IV through I are normally allowed contact visitation. *Id.* at 775-776. For many MDOC facilities, especially those housing lower security level prisoners, when non-contact visitation is necessary, it takes place in a cubicle located in the open visitation room. However, regardless of whether a visitor is going to participate in contact or non-contact visitation, all

visitors wait in the same waiting room, where they mingle with other visitors. *Id.* at 776-777.

3. The Proceedings Below

As a result of the 1995 visitation changes, Respondents filed a civil rights action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Michigan alleging that MDOC's 1995 visitation policy deprived them of their rights to privacy and family integrity, freedom of association, due process, and the right to be free of cruel and unusual punishment in violation of the First, Eighth and Fourteenth Amendments to the United States Constitution. In their complaint, Respondents sought declaratory, preliminary, and permanent injunctive relief. The district court held a three-day hearing on September 21, 22, and 28, 1995, which included testimony from various MDOC officials. On October 6, 1995, the district court issued an opinion and order denying Respondents' motion for preliminary injunction. *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1995).[2]

While Respondents' appeal of the October 6, 1995 opinion and order was pending, on December 5, 1995, Petitioners filed a motion for dismissal and/or summary judgment in which they argued that because Respondents have no constitutional rights to prison visitation as a matter of law, their complaint should be dismissed. After hearing oral argument from both parties, on April 9, 1996, the district court issued an opinion and order granting Petitioners' motion for summary judgment and

2 The district court determined that Respondents' claim that the visitation rule restricting visitation privileges upon an inmate being found guilty of two substance abuse major misconducts violated the Eighth and Fourteenth Amendments was not ripe for decision, and therefore it was not ruled on by the district court.

entered a judgment dismissing the case.[3] Respondents' appeal to the United States Court of Appeals for the Sixth Circuit of the April 9, 1996 judgment was consolidated with their appeal of the October 6, 1995 opinion and order for the purpose of submission.

After briefing by the parties and oral argument, on September 4, 1997, the Court of Appeals affirmed the district court's April 9, 1996 opinion and order granting Petitioners' motion for summary judgment. In its decision, the Court of Appeals determined that because there is no constitutional right to prison visitation, the 1995 visitation restrictions do not violate the First, Eighth or Fourteenth Amendments to the United States Constitution. *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997). Subsequently, on January 5, 1998, the Court of Appeals issued an opinion clarifying that its September 4, 1997 decision only applied to **contact** visitation. *Bazzetta v. McGinnis*, 133 F.3d 382 (6th Cir. 1998).

4. The Current Appeal

On July 2, 1998, the district court granted Respondents' motion for reinstatement of their claim that the visitation rule restricting visitation privileges upon an inmate being found guilty of two substance abuse major misconducts violated the First, Eighth and Fourteenth Amendments and their claim that MDOC's 1995 visitation policy, as applied to non-contact visitation, violated the First and Fourteenth Amendments.[4]

3 The April 9, 1996 opinion and order of the district court granting Petitioners' motion for summary judgment is not reported, but is reprinted in the Appendix to the Petition for Writ of Certiorari. (Pet. App. pp. 143a-159a.)

4 A review of the April 9, 1996 Judgment entered by the district court reveals that Petitioners' motion to dismiss and/or for summary judgment was granted and the entire case was dismissed with prejudice. (R. 55,

After Respondents conducted discovery, on May 5, 2000, Petitioners filed their second motion for summary judgment in this case. In their motion, Petitioners argued that because incarcerated felons have no constitutionally protected right to prison visitation, whether contact or non-contact, the district court should dismiss Respondents' Third Amended Complaint with prejudice. The district court heard arguments from the parties on June 21, 2000, and on June 22, 2000 the district court issued an opinion and order denying Petitioners' second motion for summary judgment.

The district court held a bench trial in this case on September 7-8, September 11-15, and September 18-19, 2000. At the bench trial in this matter, Respondents called twenty-six witnesses, including many inmates and their family members, and Petitioners called eight witnesses, seven current employees of MDOC and the former director. After the end of the testimony but before the district court heard final arguments in the case, on November 17, 2000, Petitioners filed a motion to expand the record to include the prison visitation rules for all fifty states and the District of Columbia. In their motion, Petitioners argued that how other states restrict prison visitation is relevant to the issue of whether MDOC's 1995 visitation policy is within contemporary standards of decency as required by the Eighth Amendment. After hearing oral argument from the parties on November 28, 2000, the district court denied Petitioners' motion to expand the record. (R. 223, November 28, 2000 Order at p. 1; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at p. 1939.)

While the parties were awaiting a decision of the district court, on April 9, 2001, Petitioners filed a motion to hold this matter in abeyance pending the outcome of an effort by the State of Michigan to amend MDOC's visitation rules. At the

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April 9, 1996, Judgment at p. 1; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at p. 147.)

time of Petitioners' motion, the Michigan House of Representatives was considering a bill that would amend the MDOC's definition of immediate family to include minor siblings of prisoners, which would allow minor siblings to participate in prison visitation. The district court denied Petitioners' motion to hold this matter in abeyance on April 12, 2001.[5] (R. 225, April 12, 2001 Order at p. 1; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at p. 1949.) On April 19, 2001, the district court issued its findings of fact and conclusions of law, wherein it determined that MDOC's 1995 visitation restrictions were unconstitutional with regard to non-contact visitation and the substance abuse visitation restriction. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001). The district court entered judgment in this case in favor of Respondents and against Petitioners as to all claims, along with interest, costs, and attorneys' fees as provided by law on April 25, 2001. (R. 234, April 25, 2001 Judgment at p. 1; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at p. 2031.)

On April 27, 2001, Petitioners timely filed a notice of appeal of the April 25, 2001 judgment. After the filing of briefs by both parties and oral argument, on April 10, 2002, the Court of Appeals issued an opinion affirming the April 25, 2001 judgment of the district court adopting its April 19, 2001 findings of fact and conclusions of law in favor of Respondents as to all claims. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002). The April 10, 2002 Court of Appeals decision held that the First Amendment protected a right to intimate human relationships for incarcerated felons. The April 10, 2002 decision also seriously undermined MDOC's ability to manage security at state prisons by striking down, under the Eighth Amendment's prohibition against cruel and unusual

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5 On May 24, 2001, Public Act 8 of 2001, which gives MDOC authority to permit the minor siblings of an inmate to participate in prison visitation, was signed into law. MCL 791.268a.

punishments, the use of a permanent ban on visitation as a means of disciplining prisoners for repeated substance abuse violations and other serious misconduct. Petitioners' motion to stay the issuance of the mandate in this case was denied by the Court of Appeals on May 2, 2002, and the mandate issued the same day. This Court denied Petitioners' application for recall and stay of mandate pending certiorari by letter on May 17, 2002.[6]

TRIAL TESTIMONY CONCERNING MDOC'S PENOLOGICAL INTEREST

Petitioners presented their direct case through seven current employees of MDOC and the former Director of MDOC, Mr. Kenneth McGinnis. With regard to the penological objectives at issue in the 1995 visitation restrictions, Mr. McGinnis testified that he became the Director of MDOC in April of 1991, and he remained in that position until January of 1999. Prior to the changes in the MDOC visitation rules in 1995, Mr. McGinnis testified that MDOC was concerned with maintaining security in the visiting rooms due to the volume of people who were entering MDOC facilities. Some of the security issues of concern to MDOC prior to 1995 were the introduction of contraband into prisons, inappropriate behavior in visiting rooms and the sexual abuse of children in both contact and non-contact visiting rooms. Mr. McGinnis also testified that he was aware of one situation where an inmate who was involved in non-contact visitation masturbated in front of a child who was present in the non-contact booth. In addition, Mr. McGinnis testified that in his

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6 Subsequent to this Court's denial of a stay of the mandate in this case, on May 16, 2002, the district court entered an order of compliance that enjoins MDOC from enforcing any rule, policy or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for substance abuse. (Pet. App. pp. 1a-4a.)

substantial experience as Director of MDOC, a major portion of the drugs that are introduced into prisons come through the visiting rooms. (R. 232, 9/18/00 TR 5-10; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 5297-5302.)

Mr. McGinnis stated that after the 1995 visitation restrictions were implemented, visitation at most MDOC facilities was cut approximately in half. Mr. McGinnis also testified that although the volume of visits was reduced somewhat as a result of earlier changes in MDOC visitation policy, it was not until the 1995 visitation restrictions that the volume of visits at MDOC facilities was reduced to a more manageable level. In addition, Mr. McGinnis noted that MDOC concerns regarding children in visiting rooms were not adequately addressed until the 1995 visitation restrictions. Mr. McGinnis also testified that MDOC's Executive Policy Team did discuss the problems associated with minor children being in visiting rooms especially when these children did not have a direct relationship with the inmate being visited. (*Id.* at pp. 11-15.)

With regard to children and non-contact visitation, Mr. McGinnis testified that because these children would still have to be searched prior to visitation and would still be subject to sexual abuse by way of exposure, non-contact visitation would exacerbate problems associated with children in prison. When the district judge questioned MDOC officials about whether there was any documentation to support the concern that there was masturbation or exposure occurring in non-contact visitation, Petitioners stated that they did have exhibits to verify that this was a legitimate MDOC concern. However, the district judge stated that the court would not accept these exhibits because they were only a sampling.[7] (*Id.*

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7 The record in this case reflects that although MDOC offered general information about visiting room misconducts, there is no documentation available as to how many visiting room misconducts involve children. The

at pp. 15-28.) Mr. McGinnis also testified that allowing minor children to be brought for prison visitation by someone other than their parent or legal guardian also created unique problems for MDOC. Not only is a power of attorney easy for an inmate to fabricate, but it is also difficult for a correctional employee to verify that the custodial parent has actually given permission for the child to come into prison to see an inmate. (*Id.* at pp. 35-38.)

Mr. McGinnis also testified concerning the substance abuse visitation restriction. He explained that prior to implementation of the January 12, 1998 Policy Directive PD 05.03.140 (Defs. Exh. 4, R. 294; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 2099-2110) that sets forth the criteria for the substance abuse visitation restriction, MDOC relied on the criteria set forth in the January 15, 1997 MDOC Memorandum and Application For Temporary Policy Variance (Defs. Exh. 38, R. 267; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 2562-2564) in order to determine when inmates were eligible to have their visitation reinstated. (Defs. Exhs. 4 and 38, R. 294 and 267; 6th Cir. Dk. 01-1635, 10/18/02 Jt. App. at pp. 2099-2110 and 2565-2564, filed on 8/14/00.) Mr. McGinnis testified that MDOC always intended to review the substance abuse visitation restriction and restore visitation to those inmates who were acting appropriately. Initially, MDOC took the position that an inmate could be considered for the restoration of non-contact visitation twelve months after being found guilty of two substance abuse major misconducts. However, Mr. McGinnis testified that after reviewing the situation, MDOC

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reason for this is that although a major misconduct ticket is written when an inmate exposes himself during a visit, MDOC does not record what children were present in the visiting room. Thus, although there may have only been a few instances where an inmate exposed himself to a child during non-contact visitation, given the non-contact visitation booth set-up, children participating in contact visitation may have witnessed sexual misconduct by other inmates during non-contact visitation. (Defs. Exhs. 18-25, R. 296; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 2506-2551.)

determined that a visitation restriction for substance abuse, other than alcohol, should be for two years rather than one year. Mr. McGinnis also testified that based on his experience, one of the biggest problems faced by MDOC is the introduction of drugs and the violence that results from drugs inside prison. Finally, Mr. McGinnis stated that MDOC's zero tolerance policy underlying the substance abuse visitation restriction was not too harsh, given the seriousness of the harm caused by substance abuse, as well as the fact that inmates must have two major misconducts before they lose all visitation privileges. (R. 232, 9/18/00 TR 29-35, 61-65, 73-74; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. At pp. 5321-5327, 5354-5358, 5366-5367).

The next witness called by Petitioners was Ms. Pat Caruso, who was employed by MDOC as a Regional Prison Administrator. Previously, from April of 1991 to May of 2000, Ms. Caruso was the Warden of both the Chippewa Temporary Correctional Facility and the Chippewa Correctional Facility, as well as Camp Pellston. As a Regional Prison Administrator, Ms. Caruso was responsible for managing all the correctional facilities in the upper half of the Lower Peninsula and the entire Upper Peninsula, including five maximum security level facilities which only permit non-contact visitation. Ms. Caruso testified that prior to the changes in the visitation rules in 1995, she had enormous difficulties managing the visiting rooms at her correctional facilities. Not only did she experience problems with strangers coming to visit for the purpose of delivering drugs into the prison, but she also had problems with children unrelated to any inmates coming for prison visitation. Ms. Caruso testified that she could recall times that MDOC had to cancel visits because the visiting rooms were too full. Due to the fact that visits can last an entire day, Ms. Caruso noted children can become disruptive in the visiting room, or be used by inmates to distract the attention of correctional officers who are assigned to supervise visitation. In addition, Ms. Caruso

testified that the substance abuse visitation restriction is an important management tool for dealing with higher security prisoners who have already lost most of their privileges. (R. 232, 9/18/00 TR 76-96, 106-108, 110-111; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 5369-5389, 5397-5399, 5401-5402.)

After Ms. Caruso's testimony, Petitioners called Ms. Pam Withrow to testify. Ms. Withrow served as the Warden at the Michigan Reformatory, a position she had held since 1986. During her direct testimony, Warden Withrow noted that before the 1995 visitation restrictions, children were quite a problem in the visitor waiting area at the Michigan Reformatory. Warden Withrow testified that because there are not as many children visiting now, the situation is more controlled and orderly. With regard to security, Warden Withrow noted that there are no security cameras in the non-contact booths at the Michigan Reformatory and only one correctional officer is specifically assigned to supervise visitation. Warden Withrow also testified that the non-contact visiting booths are located directly behind the contact visiting area. In addition, all visitors wait in the same area regardless of whether they will participate in contact or non-contact visitation. (*Id.* at pp. 122-132.) Warden Withrow also testified concerning a sexual misconduct that took place in the non-contact visiting booth, where an inmate was masturbating during a non-contact visit. Although there are no records to indicate whether any children were in the visiting room during this incident, a review of Defendants' Exhibit 24 reveals that due to the location of the non-contact visiting booths, this sexual activity could have been observed by children in the visiting room. (Defs. Exh. 24, R. 296; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 2538-2548). (*Id.* at pp. 137-142,145-147.)

Prior to Petitioners calling any other witnesses, the district court heard argument from the parties with regard to the

admissibility of Defendants' Exhibit 15, which consisted of a sexual misconduct report pertaining to Inmate Brown-Bey, a prisoner at the St. Louis Correctional Facility. (Defs. Exh. 15, R. 295; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 2469-2489.) While participating in non-contact visitation with his wife and minor daughter, Inmate Brown-Bey began masturbating. Although the district court ultimately admitted the written record concerning this sexual misconduct, the court refused to admit the videotape of the incident, which clearly established that the prisoner's minor daughter was able to see his exposed penis during the non-contact visit, in violation of state law. (R. 232 9/18/00 TR 132-142; R. 233 9/19/00 TR 11-24; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp 5423-5433 and 5463-5476.) Subsequently, Petitioners called Mr. Paul Renico, the Warden at the St. Louis Correctional Facility to testify concerning Inmate Brown-Bey's sexual misconduct. However, because Warden Renico was not present during Inmate Brown-Bey's sexual misconduct, the district court refused to let him testify concerning this incident. (R. 233 9/19/00 TR 65-75; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 5517-5527.) In spite of the fact that the district court refused to view the videotape of the incident and hear testimony from Warden Renico about this incident, the court determined that there was no evidence in the record to show that any child had ever been the victim of a sexual incident while participating in non-contact visitation. (R. 232 9/18/00 TR 132-142; R. 233 9/19/00 TR 11-24; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 5423-5433 and 5463-5476.)

Petitioners' next witness was Mr. Kurt Jones, who has been the Warden for both the Carson City Correctional Facility and the Carson City Temporary Facility, since 1996. During his direct testimony, Warden Jones stated that prior to the 1995 visitation restrictions, the Carson City facilities had numerous visitation problems including overcrowding in the visiting room, traffic control in the lobby area, early termination of visits, as well as people wandering around the parking lot.

With regard to children involved in prison visitation, Warden Jones testified that he could recall incidents where children almost got caught in the mechanical gates on several occasions. Warden Jones also testified that he was aware of situations where visitors attempted to introduce contraband during visits by leaving it in the parking lot or throwing it over the fence. After the 1995 visitation restrictions and the decrease in visitation, Warden Jones testified that the prison staff was better able to manage visitation, visitation with family members and loved ones was longer, and there was a noticeable decrease in attempts to introduce contraband into the prisons. Warden Jones also testified that after the substance abuse visitation restriction was implemented in 1995, he noticed a drop in the amount of narcotics that have been detected inside of the institutions. In addition, Warden Jones explained that prisoners are given substance abuse misconducts for having expired prescriptions because hoarding expired prescriptions or illegal trafficking in prescriptions creates special security problems in prison. (R. 233 9/19/00 TR 24-39; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 5476-5491.)

After Warden Jones testified, Petitioners called Ms. Sally Langley, who has been the Warden of both the Florence Crane Correctional Facility and Camp Branch since 1995. Warden Langley testified that she had been aware of situations where an inmate received a substance abuse misconduct ticket for having a prescribed medicine, if that medication was prescribed for another inmate. In her experience, prescribed medications are a form of barter inside prisons. Warden Langley also testified about an incident where an inmate was abusing an over-the-counter medication to get high. Because of this incident, that particular over-the-counter medication is no longer available to inmates in the prison store. In addition, Warden Langley noted that there is a program at the Crane Facility that allows mothers with custody of their children to participate in parenting classes and have special visits with

their children. (R. 233 9/19/00 TR 75-86; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 5527-5538.)

The last witness called by Petitioners was Ms. Julie Southwick, who was the Administrative Assistant to the Deputy Director of Correctional Facilities Administration. Ms. Southwick's job duties included overseeing MDOC's visitation policy and working with MDOC's visitor tracking program. Ms. Southwick was responsible for accumulating information regarding visiting room misconducts. (Defs. Exh. 10; R. 294; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 2235-2241.) A review of Petitioners' Exhibit 10 reveals that in 1994 prior to the changes in the visiting rules, there were a total of 710 visiting room major misconducts. (*Id.*) After the 1995 visitation restrictions were implemented, the number of visiting room major misconducts dropped dramatically. In 1996, there were a total of 498 visiting room major misconducts, and by 1999, the number of visiting room major misconducts had dropped to 334. Ms. Southwick also testified that as of the time of the trial, 567 inmates had their visitation privileges restored. As part of her job duties, Ms. Southwick visited approximately half of the total MDOC correctional facilities each year. Ms. Southwick testified that although most of the correctional facilities housing Level I and II inmates have portable non-contact booths available, some of the lower security level facilities do not have any non-contact visitation facilities. With regard to why some inmates were still on the substance abuse visitation restriction from 1995 or 1996, Ms. Southwick testified that if an inmate shows a pattern of continuing substance abuse after being placed on the visitation restriction, she would not recommend that the visitation restriction be lifted. Ms. Southwick also testified that some inmates who are still on the substance abuse visitation restriction from 1995 or 1996 have never requested to have their visitation privileges reinstated. (R. 233 9/19/00

TR 89-110, 123-138; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 5541-5562, 5575-5590.)[8]

SUMMARY OF THE ARGUMENT

I. Prisoners do not have a First or Fourteenth Amendment right to non-contact visitation. Beginning with *Pell v. Procunier*, 417 U.S. 817 (1974) (no First Amendment right to face-to-face interviews with members of the press), this Court has consistently held that First Amendment rights of association are subject to substantial restrictions because the full exercise of such rights would be fundamentally inconsistent with incarceration. There is nothing in the text of the First Amendment or the case law of this Court to suggest that the Constitution protects prisoners' right of intimate association by means of visitation. This Court has recognized that separation of an inmate from home, family or from friends is incident to incarceration, such that even a transfer to a distant state where family and friends are for all practical purposes prevented from visiting, is not a constitutional violation. *Olim v. Wakinekona*, 461 U.S. 238 (1983). The lower courts erred in concluding that the Respondent prisoners had a constitutional right to non-contact visits.

II. Even assuming a constitutional right to non-contact visitation for prisoners, MDOC's non-contact visitation restrictions do not impermissibly impinge on such a right

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8 Although Respondents raised the issue of prisoners being on the substance abuse visitation restriction longer than two years, the district court refused to admit into evidence MDOC records that would explain why certain inmates were still on a visitation restriction from 1995 or 1996. At first the district court refused to admit these records because the information contained in them was "anecdotal". The district court also refused to admit any records of inmates that were not already part of Respondents' exhibits even after Petitioners pointed out that they had offered these records to Respondents back in June of 2000. (R. 233 9/19/00 TR 111-122; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 5563-5574.)

because the rules are necessary for a legitimate penological objective, namely institutional security. The restrictions are designed to make visits more manageable for prison administrators, visitors, and prisoners by reducing the volume of visitors, including the number of children who are susceptible to abuse and who can easily be used to facilitate smuggling contraband into the prisons. Prisoners also have ready alternatives to visits for staying in contact with their relatives and friends. They can use the age-old method of letter writing, or they can use telephones. The lower courts' decisions impermissibly eliminated the most potent disciplinary tool for reducing substance abuse in the prisons by striking down the ban on visitation for those prisoners who have received two or more substance abuse misconducts. There are no ready alternatives to the regulations, and the lower courts erred in striking them down as unconstitutional.

III. Restrictions on non-contact prison visitation do not constitute cruel and unusual punishment in violation of the Eighth Amendment. Analysis of Eighth Amendment cases by this Court have established that more deference and flexibility is accorded prison administrators in cases such as this one involving prison security and discipline, as opposed to cases involving more general conditions of confinement. The lower courts erred by according no deference at all to the State's prison administrators. The lower courts also committed reversible error by failing to take account of the fact that many states use the deprivation of visitation as a management and disciplinary tool, hence the practice is entirely consistent with the benchmark of current standards of decency established by *Estelle v. Gamble*, 429 U.S. 97 (1976).

ARGUMENT

I. Prisoners Have No Right to Non-Contact Visitation Protected By the First and Fourteenth Amendments

With regard to the First Amendment, the Court has recognized two different types of associational rights that are constitutionally protected. "In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. . . . In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-618 (1984). Thus, the Court has distinguished between freedom of intimate association and freedom of expressive association. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). The type of associational right at issue in this case is the freedom of intimate association, to the extent that this right can be exercised through non-contact visitation.

This Court has not yet addressed whether incarcerated felons have a constitutionally protected First Amendment right to non-contact visitation. However, in prior cases dealing with whether prisoners retain a right to freedom of expressive association, the Court has held that these First Amendment rights are fundamentally inconsistent with incarceration. In *Pell v. Procunier*, 417 U.S. 817 (1974), the Court determined that, as long as there were other means of communication available to prisoners, incarcerated felons have no constitutionally protected First Amendment right to face-to-face interviews with members of the press. Subsequently, in *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977), the Court determined that prisoner labor unions do not

have any associational rights protected by the First and Fourteenth Amendments. "Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution." *Id.* at 125-126.

Subsequently, in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the Court held that prison regulations precluding certain religious services do not violate the First Amendment to the United States Constitution. In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Court upheld as facially valid regulations prohibiting federal prisoners from receiving publications found to be detrimental to institutional security. In addition, the Court noted that members of the public have no greater constitutional rights than inmates when it comes to prison regulations that affect the rights of prisoners and outsiders. *Id.* at 410. Recently, in *Shaw v. Murphy*, 532 U.S. 223 (2001), the Court ruled that prisoners do not have a First Amendment right to provide legal assistance to other prisoners. "In the First Amendment context, some rights are simply inconsistent with the status of a prisoner or with the legitimate penological objectives of the correctional system." *Id.* at 229. Thus, during the past twenty-eight years, this Court has consistently upheld restrictions on the First Amendment rights of prisoners to expressive association that would be unconstitutional if applied to members of the public.

With regard to whether incarcerated felons retain a right to freedom of intimate association, in *Turner v. Safley*, 482 U.S. 78 (1987), the Court upheld a prison regulation barring inmate-to-inmate correspondence, but invalidated a prison regulation barring inmate marriage. Although both prison regulations involved the freedom of intimate association, the Court upheld the prison regulation barring inmate-to-inmate correspondence

because of legitimate security concerns. In addition, the Court noted that although prison officials could regulate the time and circumstances under which the marriage ceremony itself takes place, a complete ban on allowing any inmate marriages was unreasonable. *Id.* at 85.

Even though the Court held that prisoners retain the fundamental right to marry, the Court did not hold, and has not suggested, that the right is not subject to substantial restrictions that make a prison marriage far different than the marriage of free citizens. "No doubt legitimate security concerns may require reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent." 482 U.S. at 97.

A prison marriage ceremony may take place as an expression of emotional support, public commitment, and spiritual or religious significance, but it is nonetheless "subject to substantial restrictions as a result of incarceration." 482 U.S. at 95-96. These restrictions mean that despite a prisoner's married status, a typical marital relationship that includes such things as daily contact, child rearing, family vacations, and intimate personal contact are simply not possible. The same is true in this case. Though a prisoner does not lose the right to communicate with family and friends, there is nothing in the First Amendment that creates a right to non-contact prison visitation as a means of exercising the right to intimate association.

In this case, the issue before the Court concerns the nature and extent to which members of the public may penetrate the secure perimeter of a correctional facility to participate in prison visitation. Although the Court has not directly ruled on whether incarcerated felons have a constitutionally protected First Amendment right to non-contact visitation, with regard to pretrial detainees, the Court has upheld the right of jail officials

to restrict the exercise of the First Amendment right to intimate association by pretrial detainees.

In *Block v. Rutherford*, 468 U.S. 576 (1984), the Court held that a blanket prohibition on contact visits for pretrial detainees with members of their families was not unconstitutional.

> Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates. [*Id.* at 586.]

Petitioners submit that the same security concerns for contact visitation that this Court set forth in *Block v. Rutherford, supra,* are also present with non-contact visitation. Initially, it should be noted that all visitors at MDOC correctional facilities must wait in the same waiting room, regardless of whether they will be engaging in contact or non-contact visitation. In addition, at many multiple level custody facilities, both contact and non-contact visitation takes place in the same room. Therefore, the security concerns associated with the introduction of drugs, weapons, and other contraband by visitors are not eliminated by requiring non-contact visitation for incarcerated felons. Although in *Block v. Rutherford, supra,* the Court acknowledged that there might be other alternatives to address the security issue, prison administrators are not constitutionally required to use the least restrictive means available in order to achieve the legitimate governmental objective. "In sum, we conclude that petitioners' blanket prohibition is an entirely reasonable, non-punitive response to the legitimate security concerns identified, consistent with the Fourteenth

Amendment." *Id.* at 588. *See also: Bell v. Wolfish,* 441 U.S. 520 (1979).

Although Respondents have cited previously to *Ky. Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989) to support their position that incarcerated felons have a constitutionally protected right to non-contact visitation, a review of that case reveals that Respondents' argument is without merit. In *Ky. Dept. of Corrections v. Thompson,* the Court was confronted with the issue of whether Kentucky inmates had a *liberty* interest in receiving certain visitors. After noting that state law may create enforceable *liberty* interests in the prison setting, the Court upheld prison regulations that prohibited certain persons from visiting with incarcerated felons, determining that there is no Fourteenth Amendment right to unfettered prison visitation.

> Respondents do not argue - nor can it seriously be contended, in light of our prior cases - that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause. We have rejected the notion that "*any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause." * * * The denial of prison access to a particular visitor "is well within the terms of confinement ordinarily contemplated by a prison sentence," *Hewitt v. Helms*, 459 US at 468, 74 L Ed 2d. 675, 103 S Ct 864, and therefore is not independently protected by the Due Process Clause. [*Id.* at 460-461.]

In *Olim v. Wakinekona*, 461 U.S. 238 (1983), this Court held that the transfer of a state prisoner from Hawaii to California did not violate the Due Process Clause of the Fourteenth Amendment, regardless of the impact that the transfer would have on the prisoner's ability to visit with his family.

> Respondent's argument to the contrary is unpersuasive. The Court in *Montanye [v. Haymes*, 427 U.S. 236 (1976)] took note that among the hardships that may result from a prison transfer are separation of the inmate from home and family, separation from inmate friends, placement in a new and possibly hostile environment, difficulty in making contact with counsel, and interruption of educational and rehabilitative programs. [Citation omitted.] These are the same hardships respondent faces as a result of his transfer from Hawaii to California. [*Id.* at 248, n.9.]

In this case, Respondents have never argued that MDOC's 1995 visitation policy created any liberty interest under the Due Process Clause of the Fourteenth Amendment. Rather, the issue before the Court is whether incarcerated felons have a constitutionally protected First Amendment right to non-contact visitation.

As set forth above, in prior cases dealing with whether prisoners retain a right to freedom of expressive association, the Court has held that the full panoply of First Amendment rights are fundamentally inconsistent with incarceration. Petitioners contend that there is no basis for treating the right to freedom of intimate association any more favorably than it has treated the right to freedom of expressive association, and thus, the Court should hold that this right is fundamentally inconsistent with incarceration.[9]

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[9] Recently, in *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002), *cert. den.* 123 S. Ct. 558; 154 L. Ed. 2d 462 (2002), the Ninth Circuit was confronted with the issue of whether a prisoner has a constitutional right to procreate while incarcerated. Although the Ninth Circuit acknowledged that the right to procreate is a protected part of the First Amendment right to intimate human relationships, it held that the right does not survive incarceration.

II. MDOC's Non-Contact Prison Visitation Restrictions are Reasonably Related to the Legitimate Penological Interests of Institutional Security, Safety, and Elimination of Substance Abuse

Even assuming that incarcerated felons have a constitutionally protected right to non-contact visitation, MDOC's 1995 visitation restrictions are valid. In *Turner v. Safley*, 482 U.S. 78 (1987), the Court set forth the appropriate test for determining whether a prison regulation places an impermissible restriction on the First Amendment rights of inmates. Initially, the Court noted that a prison regulation that impinges on an inmate's constitutional rights will be considered valid if it is reasonably related to a legitimate penological interest. *Id.* at 89. In order to determine when a prison regulation is reasonably related to a legitimate penological interest, the Court announced four factors to be considered by the courts: "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it. . . . Moreover, the governmental objective must be a legitimate and neutral one. . . . A second factor relevant in determining the reasonableness of a prison restriction, as *Pell* shows, is whether there are alternative means of exercising the right that remain open to prison inmates. . . . A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. . . . Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id.* at 89-90.

Thus, because the Ninth Circuit determined that the loss of the right to intimate association was part and parcel of being imprisoned for conviction of a crime, the Ninth Circuit never addressed whether the prison's regulation was related to a valid penological interest. *Id.* at 620-621, 623.

In addition, in the *Turner* case, the Court also pointed out that when a state penal system is involved, federal courts should accord deference to the appropriate prison authorities. *Id.* at 84-85. This principle was set forth in *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974) as follows:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities. [Footnote omitted]

In the September 4, 1997 decision in this case, the Court of Appeals determined that because there is no constitutional right to contact visitation, the visitation rules adopted by MDOC do not violate the First, Eighth or Fourteenth Amendments of the United States Constitution. *Bazzetta v. McGinnis*, 124 F.3d 774, 779 (6th Cir. 1997). "Our decision to affirm is supported by the well-established principle that there is no inherent, absolute constitutional right to contact visits

with prisoners." *Id.* at 779. Although that decision of the Court of Appeals only applies to contact visitation, many of the factual findings upheld by the Court in its decision, apply to non-contact visitation as well, and thus, support Petitioners' position that MDOC's 1995 visitation restrictions are constitutional. As the Court of Appeals pointed out in its decision, visitation at MDOC facilities take place in a visitation room. Contact visits are not permitted with the most dangerous inmates, those classified to level V or level VI. Non-contact visits take place in small booths or cubicles, and no contact of any kind is permitted between the prisoner and the visitor. Visitation at MDOC facilities takes place in a visitation room, and at many multiple level custody facilities, contact and non-contact visitation take place in the same room. In addition, prior to entry into the secured facility for visitation, all visitors must wait in the same waiting room regardless of whether they are waiting to engage in contact or non-contact visitation. "When the visiting rooms were fully occupied and visitors had to abide their turn in a waiting room in which there was no assigned seating, child management was even more of a problem." *Id.* at 775-777.

It should also be noted that one of the major reasons for the change in the visitation rules was the large number of people who enter Michigan prisons to visit incarcerated felons. "Unfortunately, the volume of people who enter the prisons as visitors make close monitoring of all of them difficult, if not impossible." *Id.* at 777. Because contact and non-contact visitation often takes place in the same visiting room, children are still exposed to other inmates and possible sexual and assaultive behavior. In addition, non-contact visitation does not eliminate the problems associated with smuggling contraband into a prison because contraband can be smuggled by way of other visitors and inmates that are allowed to participate in contact visitation or by leaving it in the parking lot or throwing it over the fence. Therefore, for the reasons set forth above and set forth in *Bazzetta v. McGinnis*, 124 F.3d at

779, the visitation restrictions as applied to non-contact visitation are reasonably related to legitimate penological interests, and thus, they must be upheld. *Turner v. Safley, supra.*

There are several legitimate penological interests at issue in this case. MDOC has a duty to ensure the safety of both inmates and members of the public who visit its institutions. Not only do the visitation restrictions limit the number of people who enter MDOC facilities each day, but they also enable MDOC employees to make a determination that the members of the public who are visiting MDOC facilities have a legitimate reason for visiting. The visitation restrictions also attempt to limit the number of children who visit MDOC facilities in order to better supervise them and to prevent them from being subject to physical or emotional abuse or being used to smuggle drugs, weapons or other contraband into MDOC facilities. In addition, another penological objective at issue in this case is the elimination of substance abuse by inmates incarcerated in MDOC institutions. Because visitation is valued by most inmates, the denial of visitation to an inmate found guilty of two substance abuse misconducts is one of many forms of punishment that MDOC can use to control substance abuse by prisoners.

In addition to visitation pursuant to MDOC visitation rules, inmates incarcerated at MDOC institutions have at least two alternative methods to remain in contact with members of the public. First, inmates have the opportunity to write to anyone, including the exchanging of photographs and other personal items. Second, inmates are permitted use of telephones for the purpose of making calls to anyone they wish, as long as the person is willing to accept a collect call. These alternative methods of communication were deemed constitutionally adequate in *Pell v. Procunier, supra.*

The evidence produced by Petitioners at trial in this case established that the visitation restrictions have had an impact in substantially decreasing the number of visitors at MDOC institutions within the past five years. As a result of the decrease in visitors, MDOC employees have been better able to supervise visitation, which has led to a substantial decrease in visitation related misconducts. In addition, testimony from various MDOC wardens established that the visitation restriction upon an inmate being found guilty of two substance abuse misconducts is a powerful tool to control substance abuse by inmates. Given that most MDOC facilities have only one or two non-contact visiting booths available for non-contact visitation, requiring MDOC to provide non-contact visitation for all of the people currently being excluded from MDOC facilities will have a significant negative impact on MDOC resources, including requiring extra staffing. Finally, by eliminating the volume of people who come to MDOC facilities and requiring that visitors have some legitimate connections with the inmate they are visiting, MDOC employees are in a much better position to make visitation safe for both inmates and members of the public.

With regard to the visitation rule that provides an inmate may be subjected to a permanent visitor restriction upon being found guilty of two substance abuse major misconducts, there is no dispute that eliminating illegal substance abuse by inmates is a legitimate penological objective. Respondents attempt to diminish this legitimate penological goal by pointing to a small number of inmates who have received misconduct tickets for having expired prescriptions, or for having prohibited over-the-counter medications. However, an inmate having prohibited over-the-counter medication is a security concern for MDOC because inmates hoard and sell these types of substances in prison. In addition, given that many inmates are incarcerated because of various substance abuse problems, being able to control medication abuse in prison is a legitimate security concern. Thus, the substance

abuse visitation restriction is not an exaggerated response by MDOC. In addition, because this rule is applied in such a manner as to allow an inmate the opportunity to earn back visitation privileges, the use of the permanent visitor restriction under these circumstances does not violate the United States Constitution.

Petitioners submit that the record in this case reveals that the district court and the Court of Appeals failed to properly apply the *Turner v. Safley* test. By dismissing Petitioners' evidence as "anecdotal", the lower courts placed a heightened evidentiary burden on Petitioners that has never been required of prison officials under *Turner v. Safley, supra*. In addition, the district court and the Court of Appeals erroneously placed the burden of proof on Petitioners and failed to accord any deference to MDOC authorities as required by *Turner v. Safley, supra*.

In its Findings of Fact and Conclusions of Law, the district court relied on the opinion of three alleged experts called by Respondents who had no relevant experience with MDOC correctional facilities. Although the district court cited Terry Kupers throughout its decision, during his testimony, Terry Kupers admitted that he has never been employed with any federal, state or county correctional facility and he has never performed any consulting services on behalf of a state correctional department, including MDOC. (R. 231 9/15/00 TR 33-34; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 5158-5159.) Ms. Scarnecchia also admitted during her testimony that she has never even visited a MDOC facility housing male inmates, and she has not visited two of the three facilities housing female inmates. In addition, Ms. Scarnecchia has no experience, training, or education running any correctional facility. (R. 227 9/8/00 TR 8-10; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 4262-4264.) The only other alleged expert called by Respondents, Mr. Mintzes, admitted during cross examination that he has not been employed in an MDOC

facility since 1982, thirteen years prior to the 1995 visitation restrictions. (R. 230 9/13/00 TR 94-95, 130; R. 256 9/14/00 TR 21-26; 6th Cir. Dk. 01-1635, 10/18/01 Jt. App. at pp. 4886-4887, 4922 and 4957-4962.)

In contrast to Respondents' failure to produce any relevant testimony regarding the legitimate penological interests at issue in this case, Petitioners produced seven current MDOC employees, all of whom have first-hand knowledge about all aspects of running an MDOC prison, including visitation. The record in this case reveals that every MDOC official who testified at the trial stated that the 1995 visitation restrictions, which limited the total number of visitors at MDOC facilities, including children, resulted in more manageable waiting and visitation rooms. In addition, given the shortage of non-contact booths at many lower security facilities, any significant increase in non-contact visitation will result in an adverse impact on contact visitation. Petitioners submit that because the lower courts totally ignored any testimony from MDOC employees concerning the 1995 visitation restrictions and erroneously placed the burden of proof on the MDOC to prove the constitutionality of its 1995 visitation restrictions, the April 10, 2002 Sixth Circuit decision must be reversed. *Turner v. Safley, supra*. *See also: Shaw v. Murphy*, 532 U.S. 223, 230 (2001): "Moreover, under *Turner*, and its predecessors, prison officials are to remain the primary arbiters of the problems that arise in prison management." *Id.* at p. 230.

III. MDOC's Restrictions on Non-Contact Prison Visitation Do Not Constitute Cruel and Unusual Punishment in Violation of the Eighth Amendment

In this case, the lower courts erroneously determined that depriving prisoners of visitation constitutes cruel and unusual punishment in violation of the Eighth Amendment. In *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court set forth the test for determining whether conditions of confinement in general may

result in a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. "The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency, . . . against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society." *Id.* at 102. *Estelle* addressed the specific issue of whether the failure to provide adequate medical treatment constituted cruel and unusual punishment under the Eighth Amendment. Although *Estelle* did not involve prison discipline, the Court noted that the primary concern of the drafters of the Eighth Amendment was to proscribe torture and other barbarous methods of punishment. *Id.* at 102.

Subsequently, in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Court was confronted with the issue of whether placing two prisoners in one cell constituted cruel and unusual punishment. In *Rhodes*, the Court clarified that not all harsh conditions of confinement violate the Eighth Amendment, but rather, the courts should look at whether the deprivation at issue is sufficiently serious.

> No static "test" can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." * * * But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society. [*Id.* at 346-347.]

Although the punishment at issue in *Rhodes* involved conditions of confinement (double-bunking) rather than prison

discipline, the Court noted that the issue was not whether the punishment inflicted emotional pain, but rather whether the punishment was totally without penological justification. *Id.* at 346.

In order to determine whether a given punishment is totally without penological justification, the Court has looked to contemporary values as established by the actions of other state legislatures. *Id.* at 346-347. "Indeed generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as the public attitude toward a given sanction." *Id.* at 348. More recently, in *Wilson v. Seiter*, 501 U.S. 294 (1991), the Court identified the types of deprivations that may involve an Eighth Amendment violation. "Some conditions of confinement may establish an Eighth Amendment violation in combination when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise - for example, a low cell temperature at night combined with a failure to issue blankets." *Id.* at 304.

Not only does the Eighth Amendment's prohibition against cruel and unusual punishment apply to conditions of confinement, it also sets the standard for evaluating the type of discipline that prison officials can utilize to control security in prison. In *Whitley v. Albers*, 475 U.S. 312 (1986), the Court addressed the issue of what type of conduct would be considered cruel and unusual punishment in the context of prison disciplinary measures taken during a prison disturbance. Before announcing the appropriate standard, the Court noted that an unnecessary and wanton infliction of pain standard must be applied with due regard for the fact that the case involved prison security:

> When the "ever-present potential for violent confrontation and conflagration," *Jones v. North*

> *Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977), ripens into *actual* unrest and conflict, the admonition that "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators," *Rhodes v. Chapman, supra,* at 349, *n.* 14, carries special weight. "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. at 547. That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline. It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.

In summary, the Court has given more deference to prison officials in cases involving prison security issues and prison discipline than in other Eighth Amendment cases involving more general conditions of confinement. With regard to prison disciplinary hearings, the Court has noted that the Constitution does not protect a prisoner from disciplinary segregation. In *Sandin v. Conner*, 515 U.S. 472, 485 (1995), the Court said:

> The punishment of incarcerated prisoners, on the other hand, serves different aims than those found invalid in *Bell* and *Ingraham*. The process does not impose retribution in lieu of a valid conviction, nor does it maintain physical control over free citizens forced by law to subject themselves to state control over the educational mission. It effectuates prison

> management and prisoner rehabilitation goals. * * * Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentenced imposed by a court of law.

Because prison officials must be concerned with the safety of the staff and inmate population, the Court has required that federal courts afford appropriate deference and flexibility to state officials trying to manage a volatile environment. *Id.* at 482. Last term in *McKune v. Lile*, 536 U.S. 24, 31 (2002), the Court reiterated that a range of conduct that might infringe the constitutional rights of free citizens falls within the expected conditions of confinement of those lawfully incarcerated. "Those cases nevertheless underscore the axiom that, by virtue of their convictions, inmates must expect significant restrictions, inherent in prison life on rights and privileges free citizens take for granted." *Id.* at 31.

In the instant case, the lower courts held that depriving inmates of visitation as a means of punishment for repeated substance abuse violations and other serious misconduct constitutes cruel and unusual punishment. However, the lower courts failed to heed the rulings of this Court which have made a distinction between claims of Eighth Amendment violations based on conditions of confinement and those based on prison discipline. With regard to issues of prison discipline, the Court has repeatedly held that the federal courts should defer to prison officials on matters of prison discipline and prison security. The lower courts failed to afford the states prior authority any such deference. *Whitley, supra.*

In addition, the lower courts made their determination concerning the Eighth Amendment violation without any reference to whether other states utilize visitation restrictions as a method of prison discipline. As set forth in the *Amicus Curiae* Brief of the States of Colorado, Alabama, Florida,

Georgia, Idaho, Indiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and Wyoming in Support of Petitioners in this case, at pp. 5-9, many states use the deprivation of visitation as a disciplinary tool. The lower courts' mistake was fatal because pursuant to *Estelle v. Gamble, supra,* the courts had an obligation to judge MDOC's 1995 visitation restriction based on evolving standards of decency, which clearly recognized the deprivation of visitation as a potent and acceptable tool for prison management. Therefore, given that the Court has never held that depriving an inmate of prison visitation constitutes cruel and unusual punishment, the lower courts' determination that use of a two-year visitation restriction as a punishment for repeated substance abuse violations and other serious misconduct violates the Eighth Amendment is erroneous, and Petitioners request that this Court reverse the Court of Appeals' April 10, 2002 decision.

CONCLUSION

Petitioners request this Court to reverse the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted.

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